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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1650

SUPREME EQUIPMENT & SYSTEMS CORPORATION,

Petitioner,

v.

THE WALTER M. BALLARD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

May a court of appeals issue a bare order of affirmance without an opinion when the error alleged below is the failure of the trial court to instruct the jury on an issue on which there was no evidentiary dispute in the record?

COUNTERSTATEMENT OF THE CASE

This was a civil suit brought in the United States District Court for the District of Columbia under diversity jurisdiction pursuant to 28 U.S.C. § 1332. The

Walter M. Ballard Company sued Supreme Equipment & Systems Corporation for breach of an alleged contract to pay a contingent fee for arranging for the sale of special filing cabinets to the federal government. Supreme moved to dismiss the complaint on the ground that an agreement to pay a contingent fee to procure a contract with the federal government to furnish supplies is void as against public policy and unenforceable in the courts. Ballard submitted affidavits to show that it came within the exception for "bona fide commercial or selling agencies maintained by the contractor for the purpose of securing business." 41 C.F.R. § 1-1.504-3. The District Court entered summary judgment for Supreme, finding,

> As developed by counsel at oral hearing, the facts of this case do not support the kind of continuing relationship which would bring this case within the narrow exception. Ballard's contingent fee agreement was for a specific contract for the sale of a special "privacy file" to IRS. When the efforts to procure an IRS contract failed, Ballard ceased its efforts on behalf of Supreme. Ballard's other activities on behalf of Supreme were to attempt to sell its products as a middleman, buying Supreme's products and reselling them at a mark-up to government and private purchasers. Furthermore, no continuing relationship on a broad basis has been shown. Accordingly, the Court concludes that the arrangement which Ballard seeks enforced here falls within the rule prohibiting commission agreements on sales to the federal government. [A. 4a.]

Ballard appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the District Court's judgment and remanded for trial by jury on the issue relating to the availibility

of the exception. In a Memorandum Opinion explaining that summary judgment should not have been entered because there were substantial issues, the Court of Appeals said that the District Court "had to and did stray into the forbidden area of resolving disputed questions of fact. Accordingly, its action cannot be left undisturbed." (A. 9a).

On remand, the case was tried to a jury. At trial, Supreme failed to produce any evidence from which a jury could reasonably conclude that Ballard did not come within the "bona fide" exception as defined in 41 C.F.R. § 1-1.504-3. Accordingly, there was no basis for the jury to conclude that Ballard was not entitled to enforcement of the contract in question, and the District Court refused to submit Supreme's instruction on this issue to it.

The jury found for Ballard and awarded it a judgment in the amount of $60,162.00. Supreme moved for a new trial on the basis of the District Court's refusal to instruct the jury on the enforceability issue. The District Court denied the motion, citing its reasons fo doing so in a Memorandum Opinion (A. 11a). Supreme appealed to the Court of Appeals for the District of Columbia Circuit. Supreme raised as one of the issues on appeal the District Court's refusal to instruct the jury on the enforceability of the contract. However, Supreme was unable in either its brief on appeal or at oral argument to point to any evidence adduced at trial which would have supported such an instruction. The Court of Appeals accordingly affirmed the District Court's disposition of this issue, without opinion. Supreme's subsequent petitions for rehearing and for hearing *en banc* were denied, no judge having considered Supreme's *en banc* petition voting to grant it.

REASONS FOR DENYING THE WRIT

As Supreme correctly notes in its Petition, the Judicial Conference many years ago recognized the need for flexibility in the disposition of cases at the appellate level. Following the recommendations of the Conference, the various circuits, including the District of Columbia Circuit, adopted rules specifically designed to allow for the disposition of cases without opinion where the issues occasion no need therefor. *See* Rule 13(c), General Rules of the United States Court of Appeals for the District of Columbia Circuit, revised and reprinted August, 1975.

Supreme alleges in its Petition that the judgment of the Court of Appeals in No. 78-2264 (A. 19a) was inconsistent with the previous ruling of the Court of Appeals in No. 76-1904 (A. 1a). However, as Ballard pointed out in its brief in No. 78-2264 (*see* Respondent's Appendix, 19) and further asserted in oral argument, there was no conflict between the two opinions.

The Court of Appeals' opinion in No. 76-1904 merely held that Ballard (as well as Supreme) had to be given the opportunity to present evidence demonstrating that it fell within the exceptions to the regulations on contingent fee contracts. Ballard presented such evidence, as was amply demonstrated in the record before the Court of Appeals, and is set forth in the Appendix. Supreme failed to produce any evidence that tended to dispute Ballard's proof. Thus, when the case reached the Court of Appeals in No. 78-2264, it was in an entirely different posture from that which confronted the Court in its earlier decision. In No. 78-2264, the Court of Appeals merely upheld the well-established doctrine that a party is not entitled to the jury's consideration of an issue on which it fails to produce any evidence.

In *Taylor v. McKeithen*, 407 U.S. 191 (1972), this Court set aside the ruling of the Fifth Circuit Court of Appeals and remanded for further proceedings. The Fifth Circuit had reversed without opinion the order of the district court establishing a reapportionment plan in a suit brought under the Voting Rights Act. The district court had adopted its plan after extensive hearings conducted by a special master, and a lengthy trial. The court of appeals summarily rejected the master's plan in favor of a plan proposed by the Louisiana Attorney General. This Court, noting the extensive record supporting the district court's ruling, and the lack of any guidance by the court of appeals in summarily reversing that ruling, remanded for further consideration by the court of appeals, noting that the court of appeals may have ruled as it did on the (improper) assumption that the order of the district court constituted gerrymandering.

This Court went on to note that:

> "We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District judge. . . ."

407 U.S. at 194, n.4.

Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Powell joined in a dissenting opinion, stated the following:

> "I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those

> opinions are matters best left to the judges of the courts of appeals."

407 U.S. at 196.

CONCLUSION

Unlike *Taylor, supra,* this case involves a summary affirmance of the ruling of the District Court. That ruling merely upheld a well-established, basic legal principle as stated above. Moreover, the District Court set forth with ample clarity its rationale for refusing to instruct the jury as requested by Petitioner (A. 11a). There is accordingly no basis upon which this Court should exercise its jurisdiction over this matter.

Respectfully submitted,

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